

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

ESTATE DUTY REFERENCE No 4 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and  
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

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CONTROLLER OF ESATE DUTY

Versus

KRISHNAKANT R SHAH

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Appearance:

MR MANISH R BHATT for Petitioner  
SERVED BY RPAD - (N) for Respondent No. 1

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CORAM : MR.JUSTICE R.BALIA. and  
MR.JUSTICE A.R.DAVE

Date of decision: 09/04/99

ORAL JUDGEMENT

#. At the instance of the Controller of Estate Duty, the Income Tax Appellate Tribunal, Ahmedabad Bench A the statement of the case has been submitted and following question of law have been referred to this court for its

opinion in connection with the estate duty proceedings arising on account of death of Manhargauri Rasiklal Shah who expired on 6.10.76.

"1. Whether on the facts and in the circumstances of the case, and in law the Tribunal was right in holding that as there was a clause in the partnership deed of the firm M/s. Hiralal Bhikhabhai & Co., stating that partners would not be having any share in the goodwill of the firm, on the death of deceased the goodwill was not liable to be included in the principal value of estate?

2. Whether on the facts and in the circumstances of the case, and in law the Tribunal was right in holding that since the deceased had retired from the firm (though within two years) the goodwill would not be chargeable u/s. 9 of the Estate Duty Act, 1953?"

#. The deceased was a partner in the firm of Hiralal Bhikhabhai & Co. Under clause 16 of the deed of partnership dated 18.9.76, the good will of the business were to belong to the partnership firm and not to individual partners and the deceased heirs of the deceased partners has no right in the good will. Clause 5 of the said partnership deed further envisaged that on the retirement of a partner, the firm shall not cease to exist but shall carry on business with the remaining partners or with others who may be admitted to the partnership by them. The deceased had retired from the firm which was necessitated because of prolonged sickness and physical disability. However, retirement was within two years of her death. Two fold contentions were raised. Firstly because of the clause in partnership deed deceased has no share in good will at all. Secondly, that she had retired from the firm. As on the date of death she was not a partner in the firm hence as on date of death she had no interest in the good will which could pass on her death to legal heirs.

#. The Asst. Controller negated the contention of the firm by holding that as the deceased retired within two years of his death the same shall be chargeable. Reference to retirement within two years suggests that the ACED was perhaps acting under Section 9 of the Act. He therefore included the share in the value of the good will of the said firm in the total value of the estate of the deceased chargeable to the Estate Duty.

#. The Controller of Estate Duty following the decision of this Court in *Mrudula Nareshchandra v.* CED 100 ITR 297 and of the Bombay High Court in *Smt. Urmila v.* CED 122 ITR 958 held that inclusion of good will as made by the Asst. Controller was not justified. The Tribunal on appeal by the revenue upheld the order of the Controller of Estate Duty.

#. At the outset we may notice that the decision in *Mrudula Nareshchandra's* case was concerned with passing off the interest of the deceased in the assets of the firm of which she was partner at the time of her death in the light of the similar clause as in the present case in the partnership deed. It was not a case where the deceased had ceased to be a partner in the firm much before the date of death, and she had as such no interest in the firm at the time of her death which will pass to heirs. Obviously, once a partner retires from the firm he ceases to be a partner. Thereafter at the time of death since he cannot be considered to be a partner in the firm the question of he having a disposable interest in the good will of the firm as such on the date of death does not arise. In that event, it may only be a case of computation of outstanding account of the deceased in the firm of which he was partner, if the same has not been settled by him or her as the case may be. If the accounts of partnership interest in the case of retiring partner has been settled the question of determining the interest in the partnership assets as on the date of death would not arise. In that event the only question relevant for consideration may be whether the settlement of account at less than what is envisaged under law amounts to gift and if it be considered gift it could be considered for the purpose of inclusion in the total value of estate left by deceased in terms of section 9 of the Estate Duty Act. But in no case, the question of passing interest in the good will of the firm as on the date of death will arise for consideration in case the person who was not a partner at the time of his death in any firm. Incidentally we may also notice that the decision in the case of *Mrudula Nareshchandra* to the extent it held that in view of the clause in partnership envisaging non transmission of interest in good will to the legal heirs of the deceased partner, there was a cesser of interest of the deceased partner in the good will of the firm simultaneously with his death and no interest passes therein to anyone, has since been reversed by the Supreme Court in *CED, Gujarat I v. Mrudula Nareshchandra* 160 ITR 342. The principle enunciated by Supreme Court is that where there exist a property, interest in which could pass on to successors

on the death of preset holder does not cease to be disposable interest merely because under the agreement it does not pass on the legal heirs but continues to vest in remaining partners. In that event the interest of deceased passes on to remaining partners to the extent increase in their share.

#. We therefore answer question 1 in affirmative that is to say in favour of the revenue and against the assessee by holding that the Tribunal was not right in holding that as there was clause in partnership deed of the firm M/s. Hiralal Bhikhubhai & Co. stating that partners would not be having any share in the good will of the firm on the death of deceased the goodwill was not liable to be included in the principal value of estate. We are also of the opinion on the facts of this case this consideration is not really germane for assessment of estate.

#. In considering the second question it would be necessary to refer to Section 9 of the Estate Duty Act:

"gifts within a certain period before death - (1)

Property taken under a disposition made by the deceased purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust, settlement upon person in succession, or otherwise, which shall not have been bona fide made two years or more before the death of the deceased shall be deemed to pass on the death.

Provided that in the case of gifts made for public charitable purposes the period shall be six months.

(2) The provisions of subsection (1) shall not apply to -

(a) gifts made in consideration of marriage, subject to a maximum of rupees ten thousand in value;

(b) gifts which are proved to the satisfaction of the Controller to have been part of the normal expenditure of the deceased, subject to a maximum of rupees ten thousand in value."

#. A perusal of the aforesaid section goes to show that merely because a disposition has been made within two years of the date of death by the deceased by way of another transfer does not become but liable to be included in the net value of the estate passing on the

death of the deceased, unless gift which was made within two years of the death of proposition can be held to be not bonafide. We find that the assessing authority has included the amount of the value of good will purported to have been passed to the remaining partners of the firm by way of gift by the deceased by not claiming a share in the goodwill of the firm at the time of retirement has not at all examined the question whether there was at all a gift, and if it is held to be so, such gift was not bonafide. Unless such gift can be held to be not bonafide, Section 9 would not assist the revenue in including such amount in the taxable value of the estate. The appellate authority has held it to be as quid pro quo for not sharing of liability by the retiring partner for not charging share in the good will at the time of retirement, following decision of the Bombay High Court in Urmila's case (supra). We find no material has come on record as to manner in which accounts on retirement of deceased were settled. This is on the basis of inference drawn from the fact that partnership does not dissolve on retirement of one of the partner and remaining partners are to continue with the carrying on of the business as before.

#. Be that as it may, from the admitted facts it is apparent that by not taking a share in the good will of the firm because of the term in the partnership deed even if it amounted to gift by the retiring partner in favour of remaining partners to the extent of his share in the goodwill of the firm as on the date of retirement, which was within two years of the death of the partner, it cannot be considered lacking in bonafide. It is not disputed that the deed of partnership contained the term to the exclude a retiring partner from claiming a share in the good will. That was at the time when no contemplation of estate duty or any other device to save any tax could be imputed to the agreeing partners. There is no dispute also that non charging of share in good will is solely due to the term in the deed of partnership. Finding has been recorded by Controller of Estate Duty in his appellate order that retirement was necessitated due to sickness and physical disability of retired partner. Thus even without deciding but assuming that there was a gift in favour of the remaining partners by the retiring partner on the date of her retirement, it being in accordance with already stipulated term of partnership deed, and that retirement has necessitated due to physical disability, it was not lacking in bonafide so as to fall within the purview of section 9.

#. We therefore answer question 2 in affirmative,

though for reasons different from than that has prevailed with the Tribunal, that is to say in favour of the assessee and against the revenue.

The reference accordingly stands disposed off with no order as to costs.

(Rajesh Balia, J) (A.R. Dave, J)